TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 303

THE UNITED STATES OF AMERICA, PETITIONER

vs.

JAMES DAUGHERTY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 6, 1926
CERTIORARI GRANTED APRIL 26, 1926

(30925)

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a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1924, of said Court, before the Honorable Walter H. Sanborn and the Honorable Robert E. Lewis, Circuit Judges, and the Honorable Charles B. Faris District Judge.

Attest:
(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the twenty-sixth day of January, A. D. 1924, a transcript of record pursuant to a writ of error directed to the District Court of the United States for the District of Minnesota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein James Daugherty was Plaintiff in Error and the United States of America was Defendant in Error, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 United States District Court, District of Minnesota, Fourth Division.

Term Minutes, April Term, A. D. 1923.

April 6, 1923.

Friday morning.

Court opened pursuant to adjournment.

Present: Honorable Page Morris, Judge.

And now the Grand Jury come into Court and present their true bill of indictment against James Daugherty, charging a violation of the Act of December 17, 1914; committed at Minneapolis in the County of Hennepin in the State of Minnesota in the month of January, 1923.

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2 (Indictment.)

The District Court of the United States of America for the District of Minnesota, Fourth Division.

At a stated term of the District Court of the United States of America for the District of Minnesota, begun and held at the City of Minneapolis within and for the District and Division aforesaid, on the first Tuesday in April, being the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, by a duly empanelled, charged and sworn Grand Jury of the United States of America within and for said District and Division, it is presented in manner and form following, that is to say:

United States of America,
District of Minnesota,
Fourth Division. } Set.

The Grand Jurors of the United States of America within and for said District and Division, in the name and by the authority of the said United States of America, upon their oaths present, that heretofore, to wit: on the 4th day of January, 1923, in the city of Minneapolis, in the county of Hennepin, in the state and district of Minnesota, and within the jurisdiction of this Court, one

James Daugherty,

being then and there a person required to register under the terms of the Act of Congress approved December 17, 1914, that is to say, being a person who dealt in, dispensed, sold, distributed and gave away certain derivatives and preparations of opium and coca leaves, unlawfully did then and there knowingly deal in, dispense, sell and distribute to one Charles Elmer certain derivatives and preparations of coca leaves, to wit: cocaine, the exact quantity thereof being to the Grand Jurors unknown, without then and there having registered with the Collector of Internal Revenue for the District of Minnesota, and without having paid the special tax as required by said Act of Congress;

Which is against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

Second Count

And the Grand Jurors aforesaid, upon their oaths aforesaid, further present, that heretofore, to wit: on the 10th day of January, 1923, in the city of Minneapolis, in the county of Hennepin, in the state and district of Minnesota, and within the jurisdiction of this court, one James Daugherty, the identical person named in the first count of this indictment, being then and there a person required to register under the terms of the Act of Congress approved December 17, 1914, that is to say, being a person who dealt in, dispensed, sold, distributed and gave away certain derivatives and preparations of opium and coca leaves, unlawfully did then and there knowingly deal in, dispense, sell and distribute to one F. H. Entriken certain derivatives and preparations of coca leaves, to wit: cocaine, the exact quantity thereof being to the Grand Jurors unknown, without then and there having registered with the Collector of Internal Revenue for the District of Minnesota, and without having paid the special tax as required by said Act of Congress;

Which is against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

Third Count.

And the Grand Jurors aforesaid, upon their oaths aforesaid, further present, that heretofore, to wit: on the 17th day of January, 1923, in the city of Minneapolis, in the county of Hennepin, in the state and district of Minnesota,

and within the jurisdiction of this court, one James Daugherty, the identical person named in the first count of this indictment, and being then and there a person re-
3 quired to register under the terms of the Act of Congress approved December 17, 1914, that is to say, being a person who dealt in, dispensed, sold, distributed and gave away certain derivatives and preparations of opium and coca leaves, unlawfully did then and there knowingly deal in, dispense, sell and distribute to one B. Ellison certain derivatives and preparations of opium, to wit: morphine, the exact quantity thereof being to the Grand Jurors unknown, without then and there having registered with the Collector of Internal Revenue for the District of Minnesota, and without having paid the special tax as required by said Act of Congress;

Which is against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

LAFAYETTE FRENCH, JR.,
United States Attorney.

(Endorsed) No. 1695 United States District Court, District of Minnesota, Fourth Division. The United States against James Daugherty. Indictment, Act of Dec. 17, 1914. A True Bill, E. J. Fairfield, Foreman of the Grand Jury Names of Witnesses examined before the Grand Jury, William Warner Lafayette French, Jr., United States Attorney. Filed April 6, 1923, Joel M. Dickey, Clerk.

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4 (Arraignment and Plea of Not Guilty.)

Before Judge Morris. April Term, 1923.

April 9, 1923.

And now James Daugherty, defendant in the above entitled action, personally appearing at the bar of this Court, with H. Radke, Esq., his attorney, he is arraigned upon an indictment filed in this Court against him on April 6th, 1923, charging a violation of the Act of Dec. 17, 1914; committed at Minneapolis, County of Hennepin, State of Minnesota, in the month of January, 1923; and for plea to said indictment said defendant doth say that he is not guilty.

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5 (Withdrawal of plea of not guilty and entry of plea of guilty.)

Before Judge Morris. April Term, 1923,

April 18, 1923.

And now, James Daugherty, defendant in the above entitled action, again appearing at the bar of this Court personally, by leave of the Court withdraws his plea of not guilty heretofore entered to the indictment herein against him, and for plea to said indictment said defendant doth now say that he is guilty in manner and form as in said indictment he is charged.

And sentence is deferred until April 23, 1923.

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6 (Order for issuance of bench warrant.)

Before Judge Morris. April Term, 1923,

April 23, 1923.

And now James Daugherty, defendant in the above entitled action, and Sam Swanson and John P. Blichfeldt, sureties upon the recognizance given by said defendant herein, are thrice duly called and required to come into Court and save said recognizance; but said defendant and his said sureties come not; whereupon, it is by the Court:

Ordered: that said recognizance be and the same is hereby forfeited unto the United States of America.

Further Ordered: that a bench warrant, in usual form, do issue to the United States Marshal for this District, commanding him to forthwith apprehend said James Daugherty and bring him before this Court to answer the indictment herein.

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7 Judgment and Sentence

United States District Court, District of Minnesota, Fourth Division.

Term Minutes, October Term, A. D. 1923.

September 4th, 1923.

Present:—Honorable John F. McGee, Judge.

The United States of America,
Plaintiff,
against
James Daugherty,
Defendant.

Now, on this 4th day of September, A. D. 1923, the United States Attorney for the District of Minnesota, and the defendant in the above-entitled action, James Daugherty in his own proper person, come into open court, and the said United States Attorney moves the Court that judgment be now rendered against and sentence pronounced upon said defendant in accordance with the plea, heretofore duly made by him and entered in said action that said defendant is guilty as charged in the three counts of an indictment in said action against said defendant for the crime of Dealing in and selling certain derivatives and preparations of opium and coca leaves, as charged in three separate counts committed at Minneapolis, in the County of Hennepin in the State and District of Minnesota, on the 4th, 10th and 17th days of January, A. D. 1923; and said defendant is asked by the Court whether he has anything to say why judgment should not now be rendered and sentence pronounced as aforesaid, but neither he nor anyone for him says anything in arrest thereof; whereupon, in accordance with said plea it is by the Court

Considered and Adjudged that said defendant is guilty of the crime aforesaid, and that as punishment therefor said defendant be confined in the United States Penitentiary situated at Leavenworth, Kansas, for the term of Five (5) years on each of said three counts and until he shall have been discharged from said Penitentiary by due course of law. Said term of imprisonment to run consecutively and Not concurrently.

8 (Affidavit of defendant in forma pauperis.)

State of Kansas, } ss.
County of Leavenworth. }

James Daugherty, being first duly sworn, upon his oath, deposes and says: That he is the defendant in the above entitled cause, that because of defendant's poverty he prays the Court to allow said motion to be filed in forma pauperis in such cases made and provided for by Act of Congress.

JAMES M. DAUGHERTY
Affiant.

Subscribed and sworn to before me this 26th day of October, A. D. 1923.

(Seal of Notary)

THOS. C. TAYLOR,
Notary Public, Leavenworth
County, Kansas.

My commission expires Jan. 13, 1927.

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9 (Motion of Defendant in Arrest of Judgment.)

Comes now James Daugherty, defendant in the above entitled cause, and moves the court to arrest and set aside the judgment in said cause, for the following reasons, viz:

One

That the sentence is excessive, erroneous and void and the trial court exceeded its jurisdiction.

Two.

That all of the offenses of which defendant was convicted and sentenced constitute a single continuing act, that the evidence [adequit] to any of the counts would sustain that of the others, and to impose a sentence in excess of the maximum penalty prescribed for a single offense is double jeopardy.

Three.

That because of such erroneous, void, and excessive sentence, defendant will be deprived of his right to petition for parole as provided under the provisions of the Act of June 25, 1910, Ch. 387. 36 Stat. 819.

Therefore, the defendant James Daugherty respectfully prays the Court that the judgment and sentence imposed upon defendant on the 4th day of September, A. D. 1923, be arrested and set aside, and this defendant be acquitted and discharged from the United States Penitentiary at Leavenworth, Kansas, and that he go hence without day.

JAMES M. DAUGHERTY
Defendant.

State of Kansas, } ss.
County of Leavenworth }

Subscribed and sworn to before me this 26th day of October, A. D. 1923.

(Notary Seal)

THOS. C. TAYLOR,
Notary Public, Leavenworth
County, Kansas.

My Commission expires, January 13, 1927.

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10 (Affidavit of defendant and prayer for appeal in forma pauperis.)

Comes now, James Daugherty, the defendant in the above entitled cause, and prays that an appeal be allowed in the above cause to the Circuit Court of Appeals for the Eighth Judicial Circuit. Defendant further sayeth that because of his poverty he has not sufficient means to pay the costs of said appeal, and that he is unable to give security for same, and that he is entitled to the relief sued by this action, and that his cause of action is set out in a motion, brief and assignments of error filed herein.

Defendant further sayeth that this affidavit is made for the purpose of availing himself of the rights and privileges in such cases made and provided by an Act of Congress of July 20, 1892, (Comp. Stat. 1626-1630), and further affiant sayeth not.

JAMES M. DAUGHERTY.
Affiant.

State of Kansas, }
County of Leavenworth. } ss.

Subscribed and sworn to before me this 26th day of October, A. D., 1923.

THOS. C. TAYLOR
Notary Public, Leavenworth County, Kansas.

(Notary Seal)

My commission expires, January 13, 1927.

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11 Assignment of Errors.

Comes now James Daugherty, defendant in the above entitled cause, says:

That in the proceedings of the trial of the above entitled cause in said District Court, error hath intervened to the prejudice of defendant, and makes the following assignment of errors, which the defendant avers occurred upon the trial of said cause, to wit:

I.

That the Court erred in imposing a sentence of fifteen years upon defendant, James Daugherty; that the court exceeded its jurisdiction in imposing a sentence of fifteen years, which is ten years above the maximum penalty prescribed for a violation of the Harrison [Ante]-Narcotic Act as amended by Revenue Act of 1918, 40 Stat. 1130.

II.

That each of the offenses charged, alleged and set forth in the indictment constitute a single continuous act inspired by the same intent, which is equally essential to each of the offenses charged in the three counts of said indictment, and the court erred and exceeded its jurisdiction in imposing a sentence of fifteen years upon defendant.

Wherefore, the defendant prays that the judgment of the District Court imposed upon defendant in this case on the 4th day of September, 1923, may be reversed.

JAMES M. DAUGHERTY.
Defendant.

State of Kansas, }
County of Leavenworth, } ss

Subscribed and sworn to before me this 26th day of October, A. D., 1923.

(Notary Seal)

THOS. C. TAYLOR
Notary Public, Leavenworth County, Kansas.

My commission expires, January 13, 1927.

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12 Defendant's Brief Argument.

Statement:—

That during the April session of the Grand Jury 1923, an indictment was made and returned against defendant, the indictment contained three counts and charged a violation of the Harrison [Ante]-Narcotic Act, as amended by Revenue Act of 1918, 40 Stat. 1130.

Defendant was arraigned on said indictment on the 4th day of September, 1923, and entered a plea of guilty to the indictment, that thereupon, the Court did then and there sentence defendant to five years on each of the said counts, said sentences to run consecutive, making a total of 15 years imprisonment in the U. S. Penitentiary at Leavenworth, Kansas.

Argument.

Defendant respectfully submits.

First:—That all the offenses charged, set forth and alleged in the indictment constitute a single continuous act, inspired by the same intent, which is equally essential to each of the offenses charged in the three counts [if] said indictment, and the trial court exceeded its jurisdiction in imposing a sentence in excess of 5 years, which is the maximum penalty prescribed for a violation of the Harrison Anti-Narcotic Act as amended 1918. That each of said counts contained in said indictment set out like offenses and relate to one and the same transaction.

In re ex parte Henkes, 267 Fed. 276, the Court in sustaining a demurrer on a Writ of Habeas Corpus, held:

> "It is a general rule, if two or more indictments set out like offenses and relate to one transaction, yet if one contains more of a criminal charge than the other,

but you either there would be a connection for what is embraced in the other, the offenses though of different names, are within our Constitutional guaranty the same; If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense."

In Stevens vs McClaughry, 207 Fed. 18, the Court held:

"The sentence of a defendant convicted under separate counts of an indictment under section 194 Criminal Code, committed at the same time and place, and of parts of a continuous criminal act, to impose separate punishments is beyond the jurisdiction of the Court and void as to the excess above the maximum punishment that may be imposed for a single offense, and after the defendant has satisfied such sentence he is entitled to his release by habeas corpus. Separate offenses which are committed at the same time and are parts of a continuous act, inspired by the same criminal intent which is an essential element of each offense, are susceptible of but one punishment".

That the excess of judgment beyond the jurisdiction of the Court which renders it as void as a judgment without any jurisdiction, and a prisoner held under such excess alone is entitled to his release by habeas corpus.

The following authorities concur with the above rule:—

Munson vs. McClaughey, 198 Fed. 72
Halligan vs. Wayne, 179 Fed. 112
Hans. Nelson—131 U. S. 176; 9 Sup. Ct. 672.
Kite vs. Com. 84vKy. 193; 1 S. W. 84.
13 Yarbrough vs. States, 86 Ga. 396; 12 S. E. 650.
Common vs Birdsell, 69 Pa. 482; 8 Am. Rep. 283,
Ex parte Lange, 18 Wall, 163-167-178; 21 L. Ed. 872.
Michigan Trust Co, vs. Ferry, 175 Fed. 667-677.
Mackey vs Miller, 126 Fed. 161-163.
Ex parte Peeks (D. C.) 144 Fed. 1016.
McDonald vs State, 45 Md. 90.
State vs. Gray, 37 N. J. Law. 368.

It is a rule in the United States Courts that the judgment in a criminal case must conform strictly to the provisions of the Statute, and that any violation from the provisions

of the [Statue], either in the character or extent of punishment inflicted renders the judgment void.

The following authorities concur with the above rule.

Harmon vs. U. S. 50 Fed. 921.
Ex Parte Karstendick, 93 U. S. 396.
In re Graham, 138 U. S. 461; 11 Sup. Ct. 363.
In re Johnson, 46 Fed. 477.
In re Mills, 135 U. S. 263; 10 Sup Ct. 762.
In re Pridgeon, 57 Fed. 200

In the case of this defendant the indictment contains three counts of selling and disposing of Narcotics, defendant was tricked into entering a plea of guilty and the Court imposed a sentence of 5 years on each count to run consecutive, no case can defendant [fine] where what has been done in the present case has been held to be lawful, but the uniform current authority both in England and America is to the contrary.

A leading case in England is Crepps vs Durden, Cowp. 640 in which three convictions were in excess of the maximum penalty prescribed by [statue], The opinion of the Court was delivered by Earl Mansfield, said "that there could be but one conviction, whether longer or shorter in point of duration, between the earliest day laid in any indictment and the latest day laid in any. There can be but one offense between such earliest day and the end of the continuous. "Time embraced in the indictment." Not only the Court which tried him no jurisdiction to inflict a punishment in respect of more than one of the convictions, but as the want of jurisdiction appears on the face of the judgment.

In Commonwealth vs Robison 126 Mass. 259, the Court held:

> "That the offense of keeping a tenement for the illegal sale of intoxicating liquors on a day named and on divers and other days and times between that day and a subsequent day, is but one offense, even though the tenement is kept during every hour of the time between those two days, such offense being continuous in its character.

The case of Ex parte Snow, 120 U. S. 274, Sup. Ct. 556, three counts of the same nature were laid in three indictments. The Court held that there was but one entire offense

between the earliest day laid in any indictment and the latest day had in any, and that the Court had no jurisdiction to inflict a punishment in respect of more than one of the convictions.

Defendant contends that each count contained in said indictment constitute one continuous offense and the maximum penalty which the trial court could have legally imposed for a single offense would be 5 years, that said Court was without power, authority or jurisdiction to assess a sentence of 15 years for the offenses charged in said indictment.

Defendant respectfully submits,

Second. That because of said erroneous and void sentence imposed in this case petitioner will be deprived of his right to [petitioner] for parole as provided by Act of June 25th, 1910, Ch. 387; 36 Stat. 819.

In O'Brien vs McCalughry, 209 Fed. 816, the Court held; That [were] [erronious] sentence [effects] prisoners to apply for parole, the prisoner will be discharged on habeas corpus though time under valid part of sentence had not expired.

Wherefore, this defendant respectfully prays the
14 Court to arrest and set aside the judgment in said cause.

JAMES M. DAUGHERTY.
Defendant.

State of Kansas, } ss.
County of Leavenworth. }

Subscribed and sworn to before me this 26th day of October, A. D. 1923.
(Notary Seal)

THOS. C. TAYLOR
Notary Public, Leavenworth
County, Kansas.

My commission expires, January 13, 1927.

Endorsed: Filed in the District Court on Nov 14, 1923

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15 (Order overruling Motion in Arrest of Judgment.)

The above entitled matter having come before the Court on a motion made on behalf of the defendant to arrest and set aside the judgment in said action for the following reasons:

I.

That the court erred in imposing a sentence of fifteen years upon defendant, James Daugherty; that the court exceeded its jurisdiction in imposing a sentence of fifteen years, which is ten years above the maximum penalty prescribed for a violation of the Harrison Narcotic Act, as amended by Revenue Act of 1918, 40 Stat. 1130.

II.

That each of the offenses charged, alleged and set forth in the indictment constitute a single continuous act inspired by the same intent, which is equally essential to each of the offenses charged in the three counts of said indictment, and the court erred and exceeded its jurisdiction in imposing a sentence of fifteen years upon defendant.

And the matter having been submitted on behalf of the defendant on a typewritten brief and argument, and the Court having duly considered the same, and being fully advised in the premises,

Orders that said motion be, and the same is, hereby Denied.

Dated November 14th, 1923.

JOHN F. McGEE
U. S. District Judge.

Endorsed: Filed in the District Court on Nov. 14, 1923.

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16 (Order permitting defendant to prosecute Writ of Error in Forma Pauperis.)

The defendant in the above entitled matter having made and filed with the Clerk of this Court an affidavit alleging that because of his poverty he has not sufficient means to pay the costs that may be incurred in prosecuting a writ of error in the above entitled action, and that he is unable to give security therefor, and asking that he be permitted to avail himself of the rights and privileges in such cases made and provided by the Act of Congress July 20, 1892 (Compiled Statutes 1626-1630)

And the Court believing the statements in said [effidavit] to be true to the extent that the Court has no information whatever to the contrary, hereby

Orders that the defendant be permitted to commence and prosecute a writ of error in the above entitled matter in the United States Circuit Court of Appeals of the Eighth Circuit, including all appellate proceedings without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after instituting or upon suing out a writ of error.

JOHN F. McGEE
U. S. District Judge.

Dated, November 14, 1923.

Endorsed: Filed in the District Court on Nov. 14, 1923.

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17 (Order allowing Writ of Error.)

Pursuant to the orders of this Court made and filed herein on the 14th day of November, 1923, denying said defendant's motion to arrest and set aside the judgment and sentence herein and permitting said defendant to prosecute, "in forma pauperis", a writ of error from the United States Circuit Court of Appeals for the Eighth Circuit, it is now by the Court

Ordered: that a writ of error herein be and the same is hereby allowed.

JOHN F. McGEE
Judge.

Dated November 20th, A. D. 1923.

Endorsed: Filed in the District Court on Nov. 20, 1923.

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18 (Writ of Error and Clerk's Return.)

United States of America,—ss.

The President of the United States of America,

To the Honorable the Judges of the District Court of the United States, for the District of Minnesota, Fourth Division; Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the April Term, 1923, thereof, between the United States of America, Plaintiff and James Daugherty, Defendant manifest error hath happened, to the

great damage of the said James Daugherty as by his complaint appears,

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 19th day of January, 1924, to the end that the record and proceedings aforesaid, being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable William H Taft, Chief Justice of the United States, this 20th day of November, A. D. 1923.

Issued at office in Minneapolis, Minnesota, with the seal of the District Court of the United States, for the District [or] Minnesota, Fourth Division.

(U. S. Dist. Court Seal, Fourth Division Dist. of Minnesota.)

JOEL M. DICKEY,
Clerk of the District Court of the United States for the District of Minnesota.

By THOMAS H. HOWARD
Deputy.

Allowed by JOHN F. McGEE, Judge.

United States of America,
District of Minnesota,
Fourth Division } ss.

In obedience to the command of the above writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit, a duly certified transcript of the record and proceedings in the within entitled cause, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and

affix the Seal of the District Court of the United States for the District of Minnesota, Fourth Division.

(U. S. Dist. Court Seal, Fourth Division Dist. of Minnesota.)

JOEL M. DICKEY,
Clerk of the District Court of the United States for the District of Minnesota.

By THOMAS H. HOWARD
Deputy.

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19 (Citation and Admission of Service.)

United States District Court,
District of Minnesota,
Fourth Division.

The United States of America, Plaintiff,
against
James Daugherty, Defendant.
(No. 1695)

United States of America,

To The United States of America, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's office of the United States District Court, District of Minnesota, Fourth Division, wherein James Daugherty is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

JOHN F. McGEE
Judge of the United States District Court for the District of Minnesota.

Dated this 20th day of November, A. D. 1923.

Due service admitted this 26th day November, 1923.

LAFAYETTE FRENCH, JR.
U. S Atty.

Endorsed: Filed in the District Court on Nov. 20, 1923.

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21 (Clerk's Certificate to Transcript.)

United States of America
District Court of the United States
District of Minnesota
Fourth Division.

I, Joel M. Dickey, Clerk of said District Court, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing consisting of 20 pages, numbered consecutively from 1 to 20, inclusive, is a true and complete transcript of the record and proceedings in the within entitled cause, wherein The United States of America is plaintiff and James Daugherty is defendant, and of the whole thereof, as appears from the original records and files of said Court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation together with proof of service thereof.

In Witness Whereof, I have hereunto set my hand, and affixed the Seal of said Court at Minneapolis, in the District of Minnesota, this 19th day of January, A. D. 1924.

JOEL M. DICKEY, Clerk,
By THOMAS H. HOWARD
Deputy Clerk.

(U. S. Dist. Court Seal,
Fourth Division Dist.
of Minnesota.)

Filed Jan 26 1924 E. E. Koch Clerk

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22 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Plaintiff in Error.)

United States Circuit Court of Appeals,
Eighth Circuit.

James Daugherty, Plaintiff in Error,
vs. No. 6595.
United States of America.

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

JAMES DAUGHERTY,
Box 7
Leavenworth, Kansas.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 2, 1924.

(Appearance of Counsel for Defendant in Error.)

The Clerk will enter my appearance as Counsel for the Defendant in Error.

LAFAYETTE FRENCH, JR.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 28, 1924.

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23 (Order of Submission.)

May Term, 1924.

Friday, May 23, 1924.

This cause having been called for hearing in its regular order and counsel not appearing for either party to make oral argument, this cause is thereupon taken by the Court as submitted on the transcript of the record from said District Court and the briefs of the parties filed herein.

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24 (Opinion.)

United States Circuit Court of Appeals
Eighth Circuit.

No. 6595.—September Term, A. D. 1924.

James Daugherty, Plaintiff in Error, vs. United States of America, Defendant in Error.	In Error to the District Court of the United States for the District of Minnesota.

Mr. James Daugherty, pro se, filed a brief.

Mr. Lafayette French, Jr., United States Attorney, and Mr. George A. Heisey, Assistant United States Attorney, filed a brief for defendant in error.

Before Sanborn and Lewis, Circuit Judges, and Faris, District Judge.

Lewis, Circuit Judge, delivered the opinion of the court.

The plaintiff in error was charged in three counts of an indictment with commissions of the offense defined by Section 2 of the Act of December 17, 1914, 38 Stat. 785, Comp. Stat. 1916, Sec. 6287-h. The first count charged that on January 4, 1923, at Minneapolis, Minnesota, he sold to Charles Elmer cocaine, the amount being unknown to the grand jury; the second, that on January 10, 1923, at Minneapolis, Minnesota, he sold to F. H. Entriken cocaine, the amount being unknown to the grand jury; and the third, that on January 17, 1923, at Minneapolis, Minnesota, he sold to D. Ellison morphine, the amount being unknown to the grand jury.

25 The contention that each sale should be taken as resulting from one and the same criminal intent and therefore the three counts charge only one crime, is not sound; because criminal intent is not an element of the crime, and because each count charges a different sale to a different person and on a different day, and if the sales were made as charged they constituted three separate offenses.

It was not necessary that the indictment negative the exceptions named in the Act. Wallace v. U. S., 243 Fed. 309,

304; Melanson v. U. S., 256 Fed. 783, 785; Rothman v. U. S., 270 Fed. 31; Manning v. U. S., 275 Fed. 29.

The plaintiff in error plead guilty to all of the charges in the three counts and was sentenced to imprisonment in the penitentiary. His motion in arrest was then denied, and he now complains that he was sentenced on the three counts to imprisonment for fifteen years, five years on each count, the maximum provided in Section 9 of the Act. In this we think he is mistaken, and that the sentence was only for a term of five years. It reads thus: That the defendant "be confined in the United States Penitentiary situated at Leavenworth, Kansas, for the term of Five (5) years on each of said three counts and until he shall have been discharged from said Penitentiary by due course of law. Said term of imprisonment to run consecutively and not concurrently."

Where sentences are imposed on verdicts of guilty, or pleas of guilty, on several counts or on several indictments consolidated for trial, it is the rule that the sentences so imposed run concurrently, in the absence of specific and definite provision therein that they be made to run consecutively by specifying the order of sequence. If the order in which the terms of imprisonment for the different offenses is to be served, is not clearly designated, the terms are to be served concurrently, and the defendant cannot be held in further confinement under the sentence after the expiration of the longest term imposed. Cumulative sentences are permissible, and in some cases are appropriate, but when imposed on different counts or indictments there must be certainty in the order of sequence. Howard v. U. S., 75 Fed. 986. A clear exposition of the reasons for this requirement is made by Mr. Justice Bradley in United States v. Patterson, 29 Fed. 775. That was a proceeding on habeas corpus. One Baldwin, who sued out the writ, had been convicted and sentenced on three counts of an indictment charging him with violation of the National Banking Act. The sen-
26 tence was this: "The court do order and adjudge that the prisoner, Oscar L. Baldwin, be confined at hard labor in the State's prison of the State of New Jersey, for the term of five years upon each of the three indictments above named, said terms not to run concurrently; and from and after the expiration of said terms until the costs of this prosecution shall have been paid." In considering the effect of this sentence the learned Justice said:

"It is manifest that the judgment or sentence in this case is uncertain in this respect: it imposes the penalty of imprisonment at hard labor in the state's prison for the term of five years upon each indictment, and adds that the said terms shall not run concurrently, but does not specify upon which indictment either of said terms of imprisonment is to be undergone. If the prisoner is to be detained in prison for three successive terms, neither he, nor the keeper of the prison, nor any other person, knows, or can possibly know, under which indictment he has passed his first term, or under which he will have to pass the second or the third. If, for any reason peculiar to either of said indictments, as, for example, some newly-discovered evidence, should be a different face put upon the case, so as to induce the executive to grant the prisoner a pardon of the sentence on that indictment, no person could affirm which of the three terms of imprisonment was condoned. If a formal record of any one of the indictments, and the judgment rendered thereon, were, for any reason required to be made out and exemplified, no clerk or person skilled in the law could extend the proper judgment upon such record. He could not tell whether it was the sentence for the first, the second, or the last term of imprisonment. Without the last words of the sentence, declaring that the terms of imprisonment should not run concurrently, it would be sufficiently clear and certain. It would then, by force of law, be a sentence of five years' imprisonment on each indictment, and each sentence would begin to run at once, and they would all run concurrently. Such a sentence is lawful and proper. But the addition that they were not to run concurrently, without specifying the order in which they were to run, is uncertain, and incapable of application. It seems to me that the additional words must be regarded as void.

"The words used are undoubtedly equivalent to the words 'the said terms shall follow each other successively.' But, if these words had been used, the case would not have been different. The inherent vice of being insensible and
27 incapable of application to the respective terms, without specifying the order of their succession, would still exist. The joint sentence is equivalent to three sentences, one on each indictment. One of them is applicable to the indictment for misapplication of funds; but, if they are successive, which one? That which is first to be executed, or that which is secondly or thirdly to be executed? No intelligence is sufficient to answer the question. A prisoner is en-

titled to know under what sentence he is imprisoned. The vague words in question furnish no means of knowing. They must be regarded as without effect, and as insufficient to alter the legal rule that each sentence is to commence at once, unless otherwise specially ordered.

"If this were a mere error, it could not be considered on habeas corpus. The judgments of the district and circuit courts in criminal cases are final, and cannot be reviewed by writ of error, and a mere error of law, if in fact committed, is irremediable; as much so as are the decisions of the supreme court. But if a judgment or any part thereof is void, either because the court that renders it is not competent to do so for want of jurisdiction, or because it is rendered under a law clearly unconstitutional, or because it is senseless, and without meaning, and cannot be corrected, or for any other cause, then a party imprisoned by virtue of such void judgment may be discharged on habeas corpus.

"I do not say that the judgment in this case is void. It is a good judgment for the term of five years' imprisonment on each indictment. Perhaps these terms might have been lawfully made to take effect successively, if the order of their succession had been specified, although there is no United States statute authorizing it to be done. But this was not done. No distinction was made between them in this respect, and, as neither of them was made to take effect after the one or the others, they all took effect alike; that is, from the time of the rendering of judgment. The additional words as to non-concurrence are void because they are incapable of application. It is as if a man should be sentenced to successive terms of imprisonment on each of several indictments, and to hard labor, or to be kept on bread and water, during one of the terms, without specifying which. The latter part of such a sentence would clearly be void, for it could not be allowed to the jailer to exercise his discretion as to the application of the aggravated penalties.

28 "If there were any way in which the district court could amend its judgment, the case might perhaps be different. But I see no way in which it could do so without passing a new sentence, and that it could not do now, after the term has passed, and after one term of imprisonment has been suffered. What right would the court have now to determine that the expired term was due to any particular indictment more than to either of the others?"

We conclude that the contention is without merit, that plaintiff in error was not sentenced to imprisonment for fifteen years but for a term of five years. There was no error in the proceedings.

Affirmed.

Filed November 5, 1924.

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29 (Judgment.)

United States Circuit Court of Appeals,
Eighth Circuit.

September Term, 1924,
Monday, November 10, 1924.

James Daugherty, Plaintiff in Error,

vs.

United States of America.

In Error to the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court, and that the contention of the plaintiff in error that he was sentenced to imprisonment for fifteen years, five years on each count, is without merit, and that the plaintiff in error was not so sentenced but for a term of five years.

It is further ordered that the defendant in the Court below, James Daugherty, do surrender himself to the custody of the United States Marshal for the District of Minnesota, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

November 10, 1924.

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30 Petition for Rehearing.

The United States of America, Defendant in Error in above entitled cause, by Lafayette French, Jr., United States Attorney for the District of Minnesota and attorney for said Defendant in Error, respectfully petitions and prays this Court for a rehearing on the following grounds in the matter of the decision of this Court in above entitled cause, which decision was filed on November 5, 1924:

I.

The Plaintiff in Error Made No Assignment of Error Pertaining to the Alleged Illegality of the Sentences
31 Imposed, and the Defendant in Error Had No Notice of and No Opportunity to Argue the Alleged Error Noticed by the Court on Which Said Decision Is Predicated.

In the opinion of the Court in this cause, it is held in effect that a five year term of imprisonment, instead of fifteen years as the court below intended, was imposed on plaintiff in error, for the reason that the court below failed in pronouncing judgment and sentence to specify the order of sequence in which the sentences imposed on the three counts of the indictment were to run and be served.

Neither in his brief nor elsewhere has plaintiff in error raised this question, either by assignment of error or otherwise, and consequently Defendant in Error was without notice thereof and has been afforded no opportunity to argue same. The United States of America, Defendant in Error, respectfully submits that a rehearing under the circumstances of this case may justly and equitably be granted, especially in view of the extensive and demoralizing effect of said ruling upon an undeterminable number of criminal cases throughout the United States, making imperative a rehearing in the interest of the public welfare and the effective administration of the criminal laws of the United States.

II.

The Decision Is Contrary to the Weight of Authority
32 and Revives a Rule of Law Which Has Been Repudiated and Abandoned by the U. S. Circuit Court of Appeals for the Eighth Circuit and the Supreme Court of

the United States, and There Was No Plain Error in the Sentence Imposed.

In the above cause the Court below imposed the following sentence upon plaintiff in error:

> "To be confined in the United [State] Penitentiary situated at Leavenworth, Kansas, for the term of five years (5) on each of said three counts, and until he shall have been discharged from said penitentiary by due course of law. Said term of imprisonment to run consecutively and not concurrently."

In this cause, this Court refers in its opinion to U. S. vs. Patterson, 29 Federal 775, decided January 31, 1887. In the Patterson case defendant had been sentenced to imprisonment for the term of five years upon each of three separate indictments, said terms not to run concurrently. Howard vs. U. S., 75 Fed. 986, is also cited in the Court's opinion, in which case Judge Clark referred only incidentally to the question here involved without passing directly thereupon, the real point of objection in that case being that the sentences were rendered uncertain by reason of deduction for good time provided by statute.

In United States vs. Peeke, 153 Fed. 166, (C. C. A. 3) Peeke was convicted on five different counts of an indictment, each count charging a conspiracy. He was sentenced without reference being made to any particular count to imprisonment for the term of five years in gross. It
33 was held that this constituted a single judgment for a single term of five years and, the maximum time for which defendant could be imprisoned for conspiracy being two years, the sentence was good only to that extent. In this decision the reasoning in U. S. v. Patterson, supra, was followed and it was held in effect that where cumulative sentences are imposed, they must be imposed in the form and according to the rule set forth in the Patterson case.

We find that diametrically opposed to the rule and reasoning enunciated in the foregoing cases is a decision rendered June 22, 1915, by the U. S. Circuit Court of Appeals, Eighth Circuit, in Myers v. Morgan, 224 Federal 413. Myers was convicted on two counts in an indictment charging violations of the so-called Mann Act. The maximum punishment for each offense was five years confinement. The sentence of the Court was:

"That for his offense the said defendant be imprisoned in the penitentiary (as designated by the Attorney General of the United States) for the period of ten years, to take effect from and including this date."

Judge Trieber (at the top of page 415) said: "***in our opinion the Court did not act in excess of its jurisdiction in imposing a sentence of ten years in one judgment for two distinct offenses. That the Court may impose one sentence on a conviction for two or more offenses, providing the sentence is not in excess of the maximum allowed by law for all the offenses of which the defendant has been found guilty, has been determined In Re. Henry, 123 U. S.
34 372 ***, In Re. De Bara, 179 U. S. 316 ***, Hyde v. U. S. 198 Fed. 610, 119 C. C. A., decided by this Court, and Howard v. Moyer (D. C.) 206 Fed. 555. In U. S. v. Peeke 153 Fed. 166, 82 C. C. A. 340, a different conclusion was reached, but in view of the rulings in the cases above cited we are unable to follow that decision."

The foregoing decision directly subverts and repudiates the Patterson and Peeke decisions, supra, in effect pronouncing them entirely unsound. In the face of this decision and the approval of and authority for sentences in gross therein contained, can it be said that the rule and reasoning therefor outlined in the Patterson and Peeke cases has not long since been rejected?

But a far more striking illustration of the abandonment of this rule is found in the decision rendered in Brinkman v. Morgan, 253 Federal 553, by the U. S. Circuit Court of Appeals, Eighth Circuit, on October 28, 1918. Brinkman pleaded guilty to an indictment containing eight counts for that number of separate offenses, each count charging the forging and uttering of postal money orders. The maximum penalty for any one offense was five years. Brinkman was sentenced to imprisonment for ten years, commencing on a day specified "and to run concurrently on all counts of the indictment." Brinkman contended that the words above quoted from the sentence either made it one of imprisonment for five years or that they were without sense and rendered the sentence entirely void.

Circuit Judge Hook said: "We can conceive of no
35 sound legal objection to a single sentence for several offenses charged in one indictment, if it does not ex-

ceed the statutory maximum for all. We have held such a sentence valid. Myers v. Morgan, 139 C. C. A. 641, 224 Fed. 413."

And the language employed by the Court in this opinion at the top of page 555, plainly indicates a disposition on the part of the Court to give effect to the intention of the Court below when sentence was imposed.

The rule and reasoning in the Patterson and Peeke cases by the foregoing decisions were relegated to limbus. They cannot be reconciled with these later decisions in our own Circuit Court. Under the law in our own Circuit, if a twenty year old offender was convicted on ten counts in an indictment, each count charging a separate offense for which the maximum penalty might be five years, he could legally be sentenced to imprisonment for fifty years in gross, spanning the ordinary expectation of life. Would the prisoner, or the warden of the penitentiary or any other person know, or could they possibly know, under which count of the indictment he had served his first year, or under which counts he would have to serve the remaining years? If for any reason peculiar to any one or more of the counts, a pardon or reversal should be granted as to the offense or offenses alleged in those counts, could any person affirm which term of imprisonment was condoned? If a formal record of such an indictment and judgment rendered thereon were, for any reason, required to be made out and exemplified, could
36 any Clerk or person skilled in the law extend judgment as to each and every count therein upon such record? But regardless, such a sentence would be absolutely valid and legal under our own Eighth Circuit Court of Appeals decisions and decisions by the Supreme Court of the United States cited in Myers v. Morgan, supra. Such a sentence of fifty years in gross would involve all "the inherent vice of being insensible and incapable of application to the respective terms, without specifying the order of their succession" (using the language of Justice Bradley in the Patterson case) despite which it would nevertheless be authorized by the decisions upon which your petitioner relies.

James Daugherty, plaintiff in error in this cause, was sentenced to imprisonment for the term of five years on each of three counts in an indictment, said terms to run consecutively and not concurrently. The maximum penalty for each offense set forth in the separate counts of the indictment

was five years. If the Court below had sentenced him to imprisonment for "fifteen years in gross" such a sentence would have been invulnerable. But it would have been subject to exactly the same criticism and attack, under the ruling in the Patterson case, as the sentence actually imposed since it would have all the "inherent vice" deplored by Justice Bradley.

James Daugherty was, according to the intention and the plain effect of the language of the Court, sentenced to fifteen years imprisonment. The day upon which he passed
37 through the gates of the penitentiary he expected to remain there for fifteen years. Suppose he had actually served five years! As long as he expected to be there for fifteen years, would it make any difference to him personally, or be to his advantage in any way, or materially affect his interests if those first five years were applied to his term of imprisonment on the third count? Whether those first five years were applied to the term on either the first, second or third counts he would still expect imprisonment for ten years more. He would know that he had served a term of imprisonment on one count, that one-third of his aggregate term had expired, and that he still had to serve the two remaining terms. If he should be pardoned on one count, he would know that he had five years less to serve. Would it make any difference to him to know definitely which term he would not serve so long as his aggregate term was reduced five years? Suppose he was pardoned on the second count of the indictment and the sentence had read that the term of imprisonment on the third count was to commence to run at the expiration of the term imposed on the second count. Would the Warden be compelled to release Daugherty at the end of his term on the first count and arrange for his return in five years to commence serving his term on the third count because the sentence in substance and effect indicated that his term of imprisonment on the third count was not to commence to run until ten years from the date of his entry into the institution? Is there any plausible argument why James Daugherty at this mo-
38 ment should know exactly and with [certainity] what term of imprisonment he is serving, whether it be on the first, second or third counts of the indictment, so long as he is getting credit for each day of confinement and the aggregate number of days, weeks, months and years are reduced accordingly? There is no such reason and one might

as well undertake to argue that differences without distinction and distinctions without difference actually exist. If a pardon should be granted Daugherty as to any one of the Counts in the indictment (and it would make no difference whether it affected the first, second or third counts) or if it should be discovered that the indictment was defective as to any one of the counts (and again it would make no difference whether the first, second or third count was affected) the length of his confinement thereafter would then be determined (supposing he had served 7½ years) by deducting the time actually served from the total time remaining after five years imprisonment on that one particular count affected had been eliminated. It could not be otherwise and the rule of law is always the rule of common sense. See Blitz v. United States, 153 U. S. 308, (pp. 317-318).

In Howard v. Moyer, 206 Fed. 555 and in Blake v. Moyer, 206 Fed. 559 (D. C., N. D., Georgia) a sentence in gross had been imposed upon defendants. The Court said (p. 557): "It is perfectly clear here that what the court intended was to sentence the prisoner for five years and $1000 on the first count and to sentence him for five years and
39 $1000 on the second count, which, added together, make the sentence in this case. * * * So the purpose of the Court is clear which was to give him the maximum sentence for each offense. * * * In the present case the maximum period for which the defendant might have been sentenced, if the sentence had been on the separate counts, is not exceeded and, as has been stated, it is perfectly clear what the Court intended." The judgment in these cases was affirmed by the U. S. Circuit Court of Appeals, Fifth Circuit, in 208 Federal 678.

In Ex Parte Poole, 273 Fed. 623, (D. C. Mont.) Judge Bourquin there states: "The single sentence is other and greater than can be imposed on any one count, and common law rules would probably hold it void. 1 Bishop Cr. Prac. Sec. 1327. Modern Doctrine, however, seems to sanction it. See Brinkman v. Morgan, 253 Fed. 553, 165 C. C. A. 223. Upon error, and in view of the record, a reasonable presumption of judicial regularity will assign the imprisonment to the first count of the information and the fine to the second and third counts, and thus each offense is visited with the penalty the act authorizes."

The language employed in the sentence imposed upon Daugherty is plain and unambiguous. It evinces unmis-

takably the exact intention of the Court that he should be imprisoned in the penitentiary for an aggregate term of fifteen years. In Brinkman v. Morgan, Howard v. Moyer and Blake v. Moyer, supra, the Court examined the record, observed therefrom the intention of the court which
40 imposed the sentence, and gave effect to the sentence accordingly. Dougherty was sentenced to serve five years on each of the three counts in the indictment, said terms of imprisonment to run consecutively and not [concurretly]. Could the Court's intention have been expressed more aptly or plainly that Daugherty should be imprisoned for fifteen years? There were three counts in the indictment. The three five-year terms were to be served consecutively—one after the other. Under the words employed, after Daugherty had served five years, would any sensible person say that that first five years should be applied to the third count of the indictment? Is it not therefore just as obvious as though the Court had in so many words so stated that the first five year term of imprisonment should be on the first count, the second five year term on the second count, and the third five year term on the third count, to run and be served one after the other in exactly that order? As stated in Ex Parte Poole, supra, a reasonable presumption of judicial regularity will assign a five year term of imprisonment to each of the three counts to run and be served in the order in which the counts appear in the indictment especially in view of the fact that the Court expressly negatived the common law rule as to concurrency by stating that the sentences should be consecutive and not concurrent.

The words "successive" and "consecutive" are synonymous. "Successive" means "continuous: that is, without break", "one after another" and "in a series."
41 Words and Phrases, Second Series, Vol. 4, page 758 and cases therein cited. The word "consecutive" as used by the Court below in connection with the separate sentences on each count plainly meant that one term was to commence on the expiration of the preceding term and that said terms were to run and be served in the order in which the counts appeared in the indictment, in a series. It was practically tantamount to a sentence in gross. Nothing was omitted and no further specification as to sequence was required by law.

In Re. De Bara, 179 U. S. 322, Justice McKenna in passing upon the contention of petitioner there that the Court

had no power to give a single sentence for several offences, said: "The contention of the petitioner would make the punishment depend upon the manner of pleading, and, may be, upon the discretion of the prosecuting officer rather than upon the violation of law. And to what end? In mitigation of ultimate punishment? But that function is confided to the Court. To it is confided the power to adapt the punishment to the degree of crime."

The rule in the Patterson case, invoked on behalf of Daugherty, if it prevails here, would have the effect of stifling Courts in many cases during the past ten years (in which jurisdiction to amend the sentence originally imposed has been lost) in the expression of their views concerning the criminality of defendants and in proportioning the punishment especially to the degree in which the law had
42 been abused, because of reliance previously placed upon decisions upon which your petitioner relies; or because the niceties and perhaps the technicalities in diction were not observed to the letter; or because the Court, on account of the crush of business due to a congested criminal calendar, did not have the time or opportunity to dictate the sentence so that it would appear exactly in black and white; or because the Court relied upon the Clerk thereof, who could not write shorthand, to take down his sentence verbatim and the Clerk recorded the substance of the sentence rather than the exact language employed by the Court; or because the Court although imbued with good intention was unwary.

III.

There was no transcript of evidence in this case before this Court and this Court knew nothing of Daugherty's character and antecedence. There have been instances in which courts have invoked a certain objection, actuated by altogether human and altruistic impulses, to accomplish a certain purpose. In this case the cumulative penalties may have appeared severe.

May we be pardoned if we call this Court's attention here to the fact that Daugherty was convicted of vagrancy on March 8, 1916, in the Minneapolis Municipal Court for which he served 90 days in the workhouse; that in the same court on September 16, 1919, he was convicted of unlawful possession of morphine and fined $100; that in June 1920 he

was convicted in the U. S. District Court in Minnesota
43 for violating the Harrison Anti-Narcotic Law; that in October 1921 in the same court he was convicted for knowingly possessing altered currency; that for years he has been known to officers of the law as a hopeless drug addict, an habitual drug peddler and one of the largest connections in the Northwest for purveyors of drugs at the source. The offenses to which he pleaded guilty in this case involved the sale of the drugs to soldiers stationed at Fort Snelling. After entering his plea of guilty and before sentence, he fled the jurisdiction and became a fugitive from justice. Society requires protection from the menace of his ilk and such protection can be accomplished in only one way.

For the past ten years judges in this Circuit and elsewhere have relied upon the sound and modern doctrine promulgated in the decisions by our own Circuit Court of Appeals and the Supreme Court of the United States. To ignore these decisions at this time and revive an unsound rule of law which has been repudiated and abandoned for good reason will throw the administration of our criminal laws into chaos and afford exodus from penitentiaries throughout the United States of convicts who have run the gamut of crime involving moral turpitude, upon whom sentences have been imposed in reliance upon the aforesaid decisions. And already alarm is rampant because of the numerous writs of habeas corpus which have been and are being sued out since the [filing] of the decision in this case.

It is respectfully submitted that under the settled mod-
ern doctrine there was no error in the sentence of the
44 Court in this case; that such sentence was legal and authorized cumulative penalties aggregating fifteen years and that any ruling to the contrary will retard and have drastice and demoralizing effect upon the public welfare and the efficient administration of the criminal laws of the United States.

Respectfully submitted,

LAFAYETTE FRENCH, JR.,
Attorney for Defendant in Error and
United States Attorney.

Certificate

I, Lafayette French, Jr., Attorney for Defendant in Error and United States Attorney, do hereby certify that in my opinion the foregoing petition for a rehearing in said cause is well founded and is not made for the purpose of delay.

LAFAYETTE FRENCH, JR.,
Attorney for Defendant in Error and
United States Attorney.

Dated Dec. 26 1924

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 29, 1924.

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45 (Motion of Plaintiff in Error to strike petition for rehearing from record.)

Comes now James Daugherty, plaintiff in error in the above entitled cause and moves this Honorable Court to strike from the records of this Court the "Petition for Rehearing" filed herein by Lafayette French, Jr., Attorney for defendant in error, the United States of America, and for reasons says:

One.

That there are no legal grounds for such a petition, as the defendant in error is asking for a rehearing of a matter that was decided wholly in its favor and against the plaintiff in error, as the opinion unanimously affirmed the finding of the lower Court.

Two.

That said petition for rehearing has no precedent in law, as the opinion of this Court was unanimous and the Court did not exceed its legal right to decide a matter [collateral] to the main issue, even if same was not directly set forth as error, by the plaintiff in error, for the Court sat as an institution of justice and by law was legally bound to notice such matters.

Three.

That said petition for rehearing is drawn by said Lafayette French Jr., contains, contemptuous and unethical criticism of this Honorable Court and such malicious slander should be stricken from the records—Petition Page 11—"Under the words employed, after Daugherty has served

five years, would any sensible person say that the first five years should be applied to the third count of the indictment."

And this statement made in the face of this Court's unanimous opinion that the said sentence was not intelligible to the three learned Justices of this Court.

46 Fourth.

That said petitioner, in well chosen words again defames this Honorable Court, and charges the learned Justices thereof with going out of the record and "Invoking * * * altogether human and altruistic" (regard for and devotion to, the interest of others) "impulses to accomplish its purposes?" That is, that in reaching the learned opinion in this case, the Honorable Justices thereof were actuated by motives—Not by the law—Page 13 of the petition for rehearing.

Fifth.

That the third assignment of reasons advanced by petition for rehearing (Page 13) has no legal place in such a petition and the learned United States Attorney could hardly have placed same therein from ignorance of the law; but petitioner has maliciously advanced this attack upon the plaintiff in error in a desperate attempt to influence, prejudice and bias the minds of the learned Justices of this Honorable Court to force a rehearing of this case. The use of such tactics and the apprising of the Court of such matters, entirely outside the record, to attempt to force this Honorable Court to reverse its unanimous opinion, should merit censure of these learned Justices.

Sixth.

That no legally sufficient reason is advanced by said petition for such rehearing. All the matters and things therein being totally abstract, and seem only an appeal to this Honorable Court to save some Federal Judge who has erroneously sentenced persons convicted of violation of Federal laws. The argument advanced is, legally right or legally wrong, we petition this Court that to grant such a rehearing without regard to the fact that to reverse the unanimous opinion [solemly] rendered in this case would both stultify

and belittle the Honorable Justices that wrote and
47 affirmed this just and learned opinion.

Respectfully Submitted.

JAMES DAUGHERTY,
Plaintiff in Error.

I, James Daugherty, Plaintiff in Error, do hereby certify that the foregoing motion, to strike from the records the petition for a rehearing as therein mentioned is well founded and is not filed or made for the purpose of delay.

JAMES DAUGHERTY,
Plaintiff in Error.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 5, 1925.

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48 (Opinion on Petition for Rehearing.)

United States Circuit Court of Appeals
Eighth Circuit.

No. 6595.—December Term, A. D. 1924.

James Daugherty, Plaintiff in Error, vs. United States of America, Defendant in Error.	In Error to the District Court of the United States for the District of Minnesota.

Before Sanborn and Lewis, Circuit Judges, and Faris, District Judge.

Per Curiam:

The District Attorney has filed petition for rehearing in this case, complaining that we erred in holding that the sentence imposed on Daugherty was imprisonment for five years and in not holding that it was for fifteen years. On this subject 16 C. J. 1306 says:

"However, where successive terms of imprisonment are imposed, the sentence ought to be so definite and certain as to advise the prisoner and the officer charged with the execution of the sentence of the time of its beginning and termination, without their being required to inspect the records of any other court or of any other case. Thus a sentence to a term of years 'to commence after the expiration of former

sentence', or 'to commence at the expiration of the sentence aforesaid', but containing nothing which shows to what
49 the terms 'former sentence' or 'sentence aforesaid' relate, has been held to be void for uncertainty. Where defendant is found guilty of more than one offense, if the court desires to have imprisonment under one sentence commence on the expiration of another, the sentence must so state, or else the two terms of imprisonment will run concurrently, and defendant will be entitled to his discharge at the expiration of the longest term."

These, among others, are cited in support of the text:

Fortson v. Elbert County, 43 S. E. 492, wherein it appeared that Fortson was sentenced to twelve months' imprisonment for one offense, and on the next day he was tried, convicted and sentenced to twelve months' imprisonment for a second misdemeanor. The judgment in the second case did not provide that the imprisonment thereunder should begin from the expiration of the sentence on the first verdict. He applied for [relase] by habeas corpus at the end of twelve months. The Supreme Court of Georgia, after noticing the common-law doctrine that terms of imprisonment on separate offenses run concurrently, said that where it was intended that the sentences should run consecutively, "the time the second sentence must begin shall be stated in the sentence. Failure to make such provision leaves the defendant in a position where he can claim that he has served either of the sentences or both. And this is not a mere technical right. It might be of substantial importance". The importance is illustrated by possible reversal of the conviction as to one of the offenses.

In re Breton, 44 Atl. 125, it appeared that Breton was convicted on two complaints for illegally keeping intoxicating liquors for sale, and received an alternative sentence of sixty days' imprisonment in each case. It was not stated which imprisonment should be suffered first, nor that sentence in either case should begin at the expiration of the sentence in the other. The Supreme Court of Maine, after noting the common-law rule, said:

"All the authorities agree, however, that in the absence of any statute, if it is not stated in either of two sentences imposed at the same time that one of them shall take effect at the expiration of the other, the two periods of time named will run concurrently, and the two punishments be ex-

50 ecuted simultaneously. Such Mr. Bishop declares to be the rule of the common law (1 Bish. Cr. Proc. 1310), and such has been the unquestioned rule of procedure in this state. It is familiar practice that, wherever the court imposing several sentences desires to have one begin on the expiration of another, that fact is expressly stated in the sentence; and whenever the court inadvertently fails to have the sentence recorded in that form, or from leniency intentionally omits to add such a provision, and the convict is committed in pursuance of such sentences, he is either voluntarily released by the jailer or discharged on habeas corpus at the expiration of the longest term named in either of the sentences. * * * If the sentences are in the same form, they must have the same operation. The court omitted to state which sentence should be served first, and whether either should succeed the other."

The petitioner was ordered discharged.

In State v. McKellar, 67 S. E. 314, it appears that McKellar was convicted of assault and battery with intent to kill and carrying concealed weapons. The sentence was this:

"That the defendant, Dave McKellar, be confined at hard labor upon the public works of Greenwood County for assault and battery with intent to kill, for a period of two years, or in the state penitentiary for a like period of time at hard labor, and be confined upon the public works of Greenwood County at hard labor, or in the state penitentiary at hard labor, for one year for carrying concealed weapons, under the verdict in the within indictment."

The defendant McKellar made no claim on appeal for release from custody on his conviction. It does not appear that he was, pending appeal, undergoing imprisonment. The court, therefore, was not concerned with the question involved here, but it did take occasion to say this:

"Appellant further contends that the sentence is void because it does not certainly appear whether the sentence for carrying concealed weapons is to begin at the expiration of the sentence for assault with intent to kill, or to run concurrently therewith. When several sentences are im-

51 posed for separate and distinct offenses, after conviction thereof on separate indictments, or on several counts in the same indictment, they run concurrently, unless the intention that one should begin at the expiration of the other is expressed."

In Ex parte Black, 78 S. E. 273, the defendant was convicted of two separate offenses for which he was tried at different times, and in each sentenced to a term of months on the public roads of Buncombe county. In considering whether the terms should be concurrent or consecutive the Supreme Court of North Carolina said on the subject this:

"It seems to be well settled by many decisions and with entire uniformity that, where a defendant is sentenced to imprisonment on two or more indictments on which he has been found guilty, sentence may be given against him on each successive conviction; in the case of the sentence of imprisonment each successive term to commence from the expiration of the term next preceding. It cannot be urged against a sentence of this kind that it is void for uncertainty; it is as certain as the nature of the matter will admit. But the sentence must state that the latter term is to begin at the expiration of the former one; otherwise it will run concurrently with it. Am. & Eng. Enc. of Law (2d Ed.) Vol. 25, pp. 307, 308. It is absolutely essential that the last sentence shall state that the term of imprisonment is to begin at the expiration of former sentence in order to prevent the prisoner from serving the two sentences concurrently with each other."

In re Hunt, 13 S. W. 145, it appears that Hunt was convicted under two prosecutions for keeping a gaming bank and sentenced for each offense to ten days' imprisonment in the county jail. The statutes of Texas provided that where there are two or more convictions of the same defendant at the same term, "the judgment in the second and subsequent convictions shall be that the punishment shall begin when the judgment and sentence in the preceding convictions have ceased to operate". It was held that unless the judgment in the second or subsequent conviction is so rendered, there can be no cumulation of the imprisonment.

52 We think it a sound principle, and the authorities so hold, that a convict will be discharged wherever the sentence and judgment of imprisonment for two offenses, whether charged in separate indictments or in separate counts of one indictment, does not expressly provide that imprisonment on one, to be named, shall begin when imprisonment on the other, to be named, expires. The inquiry in all such cases is not what the court may have intended by its sentence and judgment, but rather what the sentence and judgment itself expressly says. The mittimus recites the

sentence. It alone advises the keeper of the jail or penitentiary for what term or terms and for what length of time he may lawfully detain the convict, and for that purpose he cannot rely upon what he may think the court intended in that respect. His authority for detention is the writ of commitment. Its terms, taken from the sentence and judgment, must be definite and certain as to the period and length of time during which he can hold the convict in custody, and if not definite and certain the detention is unlawful. He cannot indulge in surmise or apply rules of construction in attempts to determine what in his judgment the sentence may mean as to the time of imprisonment. No authority holding to the contrary has been called to our attention.

Rehearing denied.

Filed January 30, 1925.

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53 (Order denying Petition for Rehearing.)

December Term, 1924.

Friday, January 30, 1925.

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Defendant in Error.

On consideration whereof, it is now here ordered by this Court that said petition for a rehearing of this cause, be, and the same is hereby, denied.

January 30, 1925.

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54 (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Minnesota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinions, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the

rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein James Daugherty was Plaintiff in Error and the United States of America was Defendant in Error, No. 6595, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the tenth day of February, A. D. 1925, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the District of Minnesota.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-fourth day of February, A. D. 1925.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Supreme Court of the United States.

(Order Allowing Certiorari.)

Filed April 13, 1925.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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